[illegible]

IN THE
[illegible] OF THE UNITED STATES
[illegible] Term, [illegible]

[illegible] A. BUTTERWORTH, JR.,
[illegible] of the State of Florida, and
[illegible] AUSTIN, JR.,
[illegible] to the Charlotte County, Florida,
[illegible] Grand Jury,
Petitioners,

v.

MICHAEL SMITH,
Respondent.

[illegible] CERTIORARI TO THE
[illegible] COURT OF APPEALS
[illegible] CIRCUIT

[illegible] BRIEF IN SUPPORT
[illegible] ON BEHALF OF THE
[illegible] ATTORNEYS ASSOCIATION

[illegible] A. TOMASSETTI
[illegible]
[illegible] Florida [illegible]
[illegible]

QUESTION PRESENTED

Whether, consistent with the long tradition of secrecy surrounding grand jury proceedings, a state may prohibit witnesses appearing before a state grand jury from disclosing the nature of their testimony without violating the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the United States Court of Appeals for the Eleventh Circuit who are petitioners or respondents before this Court:

Petitioners:

Robert A. Butterworth, Jr.,
T. Edward Austin, Jr.

Respondent:

Michael Smith

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TABLE OF AUTHORITIES

OPINIONS IN THE COURTS BELOW

The opinion to be reviewed is *Smith v. Butterworth*, 866 F.2d 1318 (11th Cir. 1989), reversing *Smith v. Butterworth*, 678 F. Supp. 1552 (M.D. Fla. 1988). Both opinions are reprinted in the appendix accompanying the petition for writ of certiorari. References to the materials contained in that appendix will be made by the notation "(Pet.App.)." The Court of Appeals opinion appears at Pet.App. 2; the District Court opinion appears at Pet.App. 9.

JURISDICTION

The decision of the Court of Appeals was entered on February 27, 1989. The petition was filed and docketed within the period established by Supreme Court Rule 20 and 28 U.S.C. 2101(c). The Court granted the petition on October 2, 1989. 58 U.S.L.W. 3183.

This Court has Jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are:

United States Constitution, Amendment I:

> Congress shall make no law...abridging the freedom of speech,...

Section 905.27, Florida Statutes (1985):

> (1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the

testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:

(a) Ascertaining whether it is consistent with the testimony given by the witness before the court.

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding. When a court orders the disclosure of such testimony pursuant to subsection (1) for use in a criminal case, it may be disclosed to the prosecuting attorney of the court in which such criminal case is pending, and by him to his assistants, legal associates, and employees, and to the defendant and his attorney, and by the latter to his legal associates and employees. When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil

case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and employees. However, the grant jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever.

(3) Nothing in this section shall affect the attorney-client relationship. A client shall have the right to communicate to his attorney any testimony given by the client to the grand jury, any matters involving the client discussed in the client's presence before the grand jury, and any evidence involving the client received by or proffered to the grand jury in the client's presence.

(4) Persons convicted of violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.083, or by fine not exceeding $5,000 or both.

(5) A violation of this section shall constitute criminal contempt of court.

STATEMENT OF THE CASE

A. Background Facts.

On March 27, 1986, petitioner T. Edward Austin as State Attorney assigned to the Charlotte County, Florida, Special Grand Jury, subpoenaed respondent Michael Smith, a reporter for the *Charlotte Herald-*

News, to testify before a special grand jury investigating activities in the Charlotte County state attorney's office and the sheriff's department. At the time Smith testified, he was warned by Austin's staff that disclosure of his testimony was prohibited by §905.27, Florida Statutes (1985), and could result in criminal prosecution.

The special grand jury terminated its investigation in April, 1986. Smith now wants to publish a news story and possibly a book about the subject matter of the special grand jury's investigation, including his observations of the grand jury process and the matters about which he testified. Such disclosures are prohibited by §905.27, Florida Statutes (1985).

B. The Complaint and Evidence.

Respondent Smith brought suit in the Federal District Court for the Middle District of Florida claiming that §905.27 operates as an unconstitutional prior restraint and penal sanction on his First Amendment right of free speech. The complaint reveals it is not simply his own testimony that Smith would like to write about, but also "the matters that were under investigation by the Charlotte County Special Grand Jury, including the grand jury proceeding itself." See Pet. App. 31. Hence, Smith argues for the constitutional right to publish not only his own testimony but also other testimony and evidence that may have been revealed to him while in the presence of the grand jury. This would necessarily include such matters as the identities of

the grand jurors; questions posed or statements made by grand jurors; statements by the prosecuting attorney; anything observed about the source or character of evidence before the grand jury; and any other interaction between and among persons in the grand jury room relating to testimony and evidence received during the proceeding. Indeed, the District Court found this to be Smith's intention. See Pet. Ap. 19.

Florida, like 16 other states, forbids publication of such matters.[1]

In the District Court proceedings, Smith presented the testimony of two witnesses. W. Christian Hoyer, a chief assistant state attorney in Florida who had ten years experience as a federal prosecutor (R11, p.14), testified that his office handled 15,000 felonies a year and 50 to 100 grand jury indictments (R 11, p.19). When asked if he felt there was a growing need to require witness secrecy, he said he did not feel competent to give an opinion (R 11, p.20). He acknowledged that in his experience lack of secrecy in the federal system had on occasion slowed an investigation but not jeopardized it (R 11, p.17). Hoyer stated, however, that particularly with respect to long-term investigations lack of secrecy had a "negative impact" (R 11, p.20). As a result, one investigation "didn't go as far as it could have gone" (R 11, p.21). Witnesses who spoke to the press in fact "made the grand jury angry in some instances" (R 11, p.21). Another negative effect of such disclosures was

[1] See Appendix "A" to Memorandum of Law in Support of Motion for Preliminary Injunction (R3).

"to broadcast the nature of the investigation to others," but Hoyer could not cite a specific instance where that caused a "concrete harm"

John Fitzgibbons, Smith's only other witness and also a former federal prosecutor, had handled "in excess of fifty" grand jury investigations (R11, pp. 9-10). He testified that he "couldn't think of any" problems caused by the lack of a secrecy requirement for federal grand jury witnesses.

The District Court had before it in support of the statute the affidavit of State Attorney Joseph D'Alessandro of Florida's Twentieth Judicial Circuit (R 14, Exhibit A); and the depositions of Warren Goodwin (R 17) and Don Modesitt (R 18).

D'Alessandro, who has 20 years experience with Florida grand juries, stated that barring witness disclosure of testimony "encourages free and unhampered disclosure by persons who have some information pertinent to the subject matter of investigation," and that allowing witnesses to publicly disclose the nature and content of the testimony "will be a hindrance to prosecution." D'Alessandro knew of instances where a person's character was besmirched by witness disclosures.

Warren Goodwin, an assistant state attorney, has worked with 24 Leon County, Florida grand juries (R 17, p.4). He testified that under Florida law a grand jury that fails to complete its work during its term will pass the pending matters to a subsequent grand jury (R 17, p.5). Goodwin said witness disclosure of testimony would lead to public ridicule or embarrassment from unfounded allegations (R 17,

pp.6-7) and impair the integrity of future grand juries seeking to rely on testimony adduced during a preceding grand jury (R 17, p.8). Goodwin also said witness disclosure would violate the oath administered to witnesses (R 17, pp. 9-11).

Donald Modesitt served as a federal prosecutor in North Florida working with federal grand juries, and also as State Attorney for Florida's Second Judicial Circuit (R18, pp.4-6). Modesitt said there are differences between federal and Florida grand juries in that state grand juries are more investigative in nature (R 18, p.7). Federal grand juries cannot charge without indictment, whereas, under Florida law, an information may be filed or a presentment issued (R 18, pp. 10-11). He feared disclosure of witness testimony because suspects may flee from justice, destroy evidence, or engage in cover-up activities, thereby compromising an investigation (R 18, pp.10-12). Additionally, the grand jurors themselves may be subjected to apprehension and fear of disclosure of their identities (R 18, p.9).

C. Rulings Below

The District Court found the Florida statute constitutional in that it was based upon "a compelling need for continued secrecy." Pet. App. 20. The Court found the statute was "designed to enhance Florida's ability to detect and eliminate organized criminal activity by improving the evidence-gathering process." *id.* The statute served not only to protect the

identity of the grand jurors[2] but also prevented the hindering of prosecution impairment of present and future investigations. id. Rejecting Smith's contention that some lesser degree of secrecy might hypothetically serve these interests, the District Court stated:

> The Florida legislature has opted for the maximum possible [secrecy]. The court believes that it is absolutely within the discretion of the legislature that it make that quantitative analysis of its judicial process.

(Pet.App. 28)

The Eleventh Circuit Court of Appeals, while acknowledging that the foregoing interests were "legitimate," did not find them "sufficiently compelling to justify the criminal punishment of *any* person, including a witness, who divulges the content of grand jury testimony." Pet. App. 6. It therefore ruled the statute unconstitutional to the extent it applied "to

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[2] The District Court could not have stated this more forcefully:

> The Court believes that independence of mind is as important for the grand jurors as for the witnesses in the truth-gathering process, if not more so. Permanent, total confidentiality allows the necessary independence of mind required for the effective functioning of the grand jury. It allows the juror to be as certain as he possibly can be that his identity will not be revealed, subjecting him to retaliation. This frees the juror to ask searching questions.

Pet. App.27.

witnesses who speak about their own testimony *after* the grand jury investigation is terminated." *Id.* at 7 (emphasis supplied).

The opinion of the Court of Appeals is not clear as to whether a witness may divulge, in addition to his testimony, that which he observes or infers from the proceedings. Presumably, because the Court found *all* of the state's interests in secrecy insufficiently compelling, *id.* at 6, a witness may do so.

INTERESTS OF THE AMICI CURIAE AND SUMMARY OF ARGUMENT

The Florida Prosecuting Attorneys Association is governed by the twenty state attorneys of Florida who make up the membership along with every assistant state attorney in Florida. Their purpose is to represent the views of prosecutors statewide and further the cause of justice in the State of Florida.

The Florida Prosecuting Attorneys Association strongly believes that the proper functioning of the grand jury depends upon secrecy, even after grand jury activities cease. Only a cloak of total secrecy can protect the rights of the innocent accused and permit the grand jury to deliberate without fear of future harassment.

The interest of a reporter to describe secret grand jury proceedings is a peripheral First Amendment right because the information is obtained

only by virtue of the reporters participation in the grand jury.

Florida has good grounds to require total secrecy of the grand jury, a requirement which it legitimately believes is essential to protect the substantial governmental interest in just and effective law enforcement. Therefore, the decision of the District Court should be reinstated and the judgment of the Court of Appeals should be reversed.

ARGUMENT

A STATE MAY PERMANENTLY BAR WITNESSES FROM PUBLICLY DISCLOSING THE TESTIMONY THEY HAVE GIVEN BEFORE A GRAND JURY WITHOUT VIOLATING THE FIRST AMENDMENT.

I. Secrecy as the foundation of Grand Jury effectiveness.

Florida Statutes Section 905.27 follows the values of both English and American common law by providing the utmost secrecy for grand jury proceedings. The Grand Jurors themselves are instructed that, "...the Grand Jury System is of ancient vintage. History has proved its effectiveness in regulating the affairs of free people. The seven hundred years of its existence in its present form justifies it as a guardian of all that is comprehended

in the police power of the state... The law requires that the notes, records and any transcriptions prepared by the court reporter (of Grand Jury proceedings) be impounded and sealed when your work is completed." *Grand Jury Instructions, Circuit Court of Duval County, Florida*, Instructions 1.5, 4.6.

Florida's Grand Jury system is not limited to investigation of criminal matters.

> The Grand Jury has broad investigatory powers not only to inquire into violations of criminal law but also into all phases of the civil administration of government. *Smith v. Butterworth*, 678 F. Supp. 1552 (M.D. Fla. 1988).

The Grand Jury is instructed to inquire into matters of governmental administration and corruption. The Grand Jury is able to make reports on its findings, in lieu of indictment, and reflect upon negligence or incompetence on the part of public officials. *Grand Jury Instructions, Circuit Court of Duval County, Florida*, Instructions 3.1, 3.4.

The policy upholding the secrecy of Grand Jury proceedings has been expressed by this court in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U. S. 211, 218-219 (1979):

> We consistently have recognized that the proper functioning of our Grand Jury system depends upon the secrecy of Grand Jury proceedings [Citation omitted.] In particular, we have noted several distinct interests served by safeguarding the confidentiality of Grand Jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the Grand Jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those to be indicted would flee, or would try to influence the individual Grand Jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the Grand Jury will not be held up to public ridicule.

Continued protection of grand jury secrecy *after* the proceeding is complete was also significant to the Douglas Oil court; "the courts must consider not only the immediate effects upon a particular grand jury

but also the possible effect upon the functioning of future grand jurys." *Douglas Oil Co. supra* at 222.

Florida Grand Jurors are able to deliberate and consider the evidence before them without fear of publication of their activities. Florida citizens are able to trust the grand jury system to keep the affairs of innocent persons confidential while effectively identifying those cases that merit a criminal inquiry. It is the secrecy of the grand jury that provides the basis for such trust.

Given the foundation of secrecy required for the proper functioning of the Grand Jury, this court has held that the "Indispensable secrecy of Grand Jury proceedings ... must not be broken except where there is a compelling necessity." *United States v. Proctor & Gamble Co.*, 356 U.S. at 682.

The Eleventh Circuit has upset this foundation and has found that "a compelling necessity" exists based upon the desire of the respondent to publish his experiences as a Grand Jury witness.

II. Respondents rights accorded by the First Amendment.

The Eleventh Circuit found that Florida Statute

905.27 undermines First Amendment freedoms when applied to witnesses who speak regarding their Grand Jury testimony after the Grand Jury investigation has been completed.

This court has often expressed the purpose of the First Amendment:

> Fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction is required in order to protect the State from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. *See Schenk v. United States. [Citation omitted]* Those who won our independence believed that the final end of the State was to make men

> free to develop their facilities; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. *Whitney v. California*, 274 U.S. 357, 47 S. Ct. 641, 71 L.Ed. 1095 (1927).

Therefore, while the First Amendment functions as a limit to legislative power, the freedom of speech granted by the First Amendment is not absolute.

In *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984) this Court considered the First Amendment rights of a newspaper that obtained information through the use of discovery proceedings as a party to a lawsuit. A protective order prohibited the paper from

publishing information obtained solely from the discovery procedure.

The court found the critical question to be "whether a litigant's freedom comprehends the right to disseminate information...obtained pursuant to a court order that both granted...access to that information and placed restraints on the way in which the information might be used." *Seattle Times Co. v. Rhinehart*, 467 U.S. at 32. The controlling inquiry was:

> 1. Whether the practice in question furthered an important or substantial governmental interest unrelated to the suppression of expression; and
>
> 2. Whether the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular interest involved.

Id., quoting *Procunier v. Martinez*, 416 U.S. 396 (1974).

The need for Grand Jury secrecy is an essential and substantial government interest unrelated to suppression of expression. The Grand Jury handles a constitutionally granted role in just and effective law enforcement. Secrecy permits the grand jury to protect the grand jurors from harassment and the

innocent accused from unjust attention and punishment. Secrecy permits the grand jury to hear information regarding ongoing criminal activities without public disclosure to the benefit of organized crime. Therefore, the state of Florida has a legitimate responsibility to control the Grand Jury process.

The Eleventh Circuit, however, found that in comparison with Federal Rule of Criminal Procedure 6(e) the Florida secrecy provision was overly broad, and therefore was not the least restrictive means necessary to uphold the integrity of the Grand Jury.

C. Federal Rules of Criminal Procedure 6(e)

Rule 6(e) of the Federal Rules of Criminal Procedure allows disclosure of witness testimony. Even so, the federal courts have found that circumstances exist which justify restrictions on witnesses speech despite rule 6(e).

In re: *Swearingen Aviation Corporation*, 486 F.Supp. 9, 10-11 (D.C. Mo. 1979), the court said:

> The language of Rule 6(e) appears on its face to be absolute and to prevent the issuance of any type of order imposing an obligation of secrecy on a

witness. Before Rule 6(e) was enacted, the practice of most federal courts was to require Grand Jury witnesses to take oaths of secrecy. *Goodman v. United States*, 108 F.2d 516, 518 (9th Cir. 1939); *United States v. Central Supply Association*, 34 F. Supp. 241, 245 n. 2 (N.D. Ohio 1940). This practice was upheld as "within the discretionary power of the court...if the court believes the precaution necessary in the investigation of crime." *Goodman*, 108 F.2d at 520; *see Central Supply Association*, 34 F.Supp. at 245...However, other courts have recognized that there are circumstances in which some restriction on disclosures by grand jury witnesses may be appropriate despite the language of Rule 6(e). In re: Grand Jury Summoned October 12, 1970, 321 F. Supp. 238, 240 (N.D. Ohio 1970); *King v. Jones*, 319 F.Supp. 653, 657-659 (N.D. Ohio 1970), rev'd on other grounds, 453 F.Supp.478 (6th Cir. 1971), vacated as moot, 405 U.S. 911, 92 S. Ct. 956, 30 L Ed.2d 780 (1972); In re: *Grand Jury Witness Subpoenas*, 370 F.Supp.1282, 1285 n. 5 (S.D. Fla. 1974). The Court does not believe that this provision was intended to prevent the imposition of an obligation of secrecy upon grand jury witnesses where necessary to protect the legitimate investigative function of the grand jury. To hold otherwise would render a court powerless to preserve the integrity of

> the judicial process...Thus the court has the power and the duty to maintain the integrity of the investigative process of the grand jury, and Rule 6(e) should not be read to command inaction when the circumstances require that it act.

Further, Rule 6(e) allows federal judges the discretion to order witnesses not to reveal their Grand Jury Testimony.

The Florida Legislature has determined that witness non-disclosure is almost always necessary to preserve the foundation of the Grand Jury. Discretion has been given the judge, however, similar to Rule 6(e), to permit disclosure of Grand Jury testimony upon petition of a witness.

The differences in procedure between Federal Rule 6(e) and Florida Statute do not mean that the Florida Statute violates the constitution. Prior to the adoption of Rule 6(e) the leading case on Grand Jury secrecy was *Goodman v. United States*, 108 F.2d 516 (9th Cir. 1939). The Goodman court said:

> This contention that the oath violates the right of the witness to freedom of speech is specious. The right is not absolute...It has never been supposed

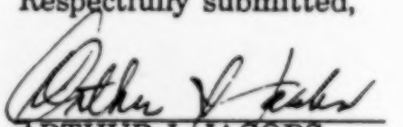
> that grand jurors are deprived of the constitutional right of free speech through an oath of secrecy which they take; and a witness summoned to appear before them is in no better case. Through their participation witnesses occupy a special relationship to the state; for reasons grounded in public policy, as we have seen, the testimony taken in these proceedings is privileged and confidential. Considerations of mere convenience or even downright hardship on the part of the witness do not outweigh the secrecy in respect to Grand Jury investigations. 108 F.2d at 520.

Ultimately the issue boils down to control of the information gathered at the Grand Jury proceeding. The interests of the First Amendment do not justify taking this control away from the Grand Jury judge and giving it to the individual witness. The State of Florida has determined that a foundation of absolute secrecy best serves the interests of the government in a fair and effective grand jury. It is within the state's discretion to make this determination.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the decision of the District Court reinstated.

Respectfully submitted,



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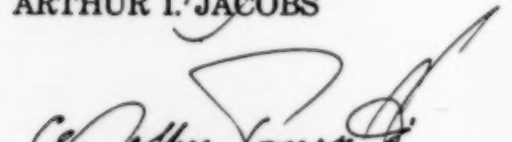

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Brief for Petitioners was served depositing three true copies in a United states Post Office or mailbox, with first-class postage pre-paid, addressed to:

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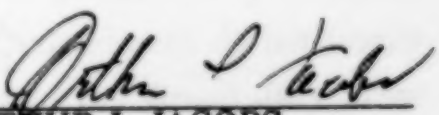

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